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In the Supreme Court of the United States

OCTOBER TERM, 1957

JAY L. JONES, PAUL J. LIVINGSTON, JACK GOTT, LEO BRANTLEY JACKSON, JOHNNY E. COLE, JAMES RICHARD HARP, WILLIAM THOMAS PETERSON, OLIVER B. STEPHENS, JOHN E. MCAFEE, T. MARTIN EDWARDS, ELMER LEE OAKLEY, JOHN DAVID HOOD, F. LEE JOHNSON, PAUL DONLEY RUCKER, AND FRED A. GRIFFING, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 45-60; R. 3-24) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1958 (Pet. App. 60-61; R. 25). A petition for rehearing (R. 26-51) was denied on January 21, 1958 (R. 52). The petition for a writ of

certiorari was filed on February 17, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established a conspiracy to violate federal law prohibiting importation of liquor into a dry state.

2. Whether the trial judge properly admitted as bearing on intent evidence of operations prior to the commencement of the conspiracy.

3. Whether the introduction of evidence that the conspiracy included control of gambling and prostitution constituted prejudicial error, notwithstanding the cautionary instructions given by the trial court.

4. Whether it was proper, in view of the separate punishments applicable, to separate into two counts the charges of conspiracy to commit a felony and conspiracy to commit a misdemeanor.

STATUTES INVOLVED

The pertinent statutes provide in part as follows:

18 U.S.C. 371.

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 1262.

Whoever imports, brings, or transports any intoxicating liquor into any State, Territory, District, or Possession in which all sales, except for scientific, sacramental, medicinal, or mechanical purposes, of intoxicating liquor containing more than 4 per centum of alcohol by volume or 3.2 per centum of alcohol by weight are prohibited, otherwise than in the course of continuous interstate transportation through such State, Territory, District, or Possession or attempts so to do, or assists in so doing.

Shall (1) If such liquor is not accompanied by such permits, or licenses therefor as may be rerequired by the laws of such State, Territory, District, or Possession or (2) if all importation, bringing, or transportation of intoxicating liquor into such State, Territory, District, or Possesssion is prohibited by the laws thereof, be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * *

STATEMENT

An indictment (Tr. 13-19) [1] filed in the United States District Court for the Northern District of Oklahoma in March, 1957, charged petitioners and others with conspiring, from 1948 to 1957, (count 1) to import liquor illegally into Oklahoma in violation of 18 U.S.C. 1262 (creating a misdemeanor), and (count 2) to violate federal alcohol revenue laws (felony offenses). The fifteen petitioners were found guilty on count 1

[1] The designation "Tr." refers to the transcript of the trial proceedings.

under instructions limiting the conspiracy to the period from March, 1956, to February, 1957 (Tr. 957, 973-976). Each was sentenced on that count to imprisonment for one year and a fine of $1,000.[2]

The evidence may be summarized as follows:

(1) About February, 1956, petitioner McAfee told one Hirrlinger that he could make a deal with petitioner Jay L. Jones, who was then running for office as police and fire commissioner of Tulsa, Oklahoma. He said it would cost about four to five thousand dollars to get Jay L. Jones elected (Tr. 557-558). In March, 1956, the two met with Jones and discussed the deal they could arrange if they could get Jones elected. Hirrlinger thought that they might be able to obtain the money but said he would have to talk to co-conspirator Bill Edwards (Tr. 558-559), a wholesale liquor dealer in Tulsa (Tr. 317-319). Hirrlinger talked to Bill Edwards shortly thereafter about getting campaign money (Tr. 560). Hirrlinger also talked separately with Jones and gave him some money with the understanding that if Jones were elected he would furnish police protection (Tr. 569-570).

Later in March, Hirrlinger met with Jones, McAfee and Edwards. Hirrlinger and Edwards gave Jones a total of about $700. It was agreed that Edwards would be in control of all the whiskey business in Tulsa, and that McAfee and Hirrlinger were to work out arrangements for the protection of gambling and possibly

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[2] Edwards and Hood were also convicted on the second count but that conviction was reversed on appeal. The Court of Appeals also reversed as to Gray, a Missouri liquor dealer who was a source of supply.

prostitution (Tr. 561-562). Jones stated that he had not made any money in the first administration and that he intended to make some money this time (Tr. 537).

Bill Edwards collected the $700 for Jones' campaign from petitioner Johnson and from the three Massey brothers, all of whom were liquor dealers in Tulsa. It was agreed that their contribution would cover future protection upon Jones' election (Tr. 533-535).

Jones was elected Police Commissioner, petitioner Livingston was appointed Chief of Police, and petitioner Gott became the head of the vice squad. In May, 1956, Bill Edwards met secretly with Hirrlinger and petitioners Jones, Livingston, Gott and McAfee. Petitioner Livingston directed the meeting. It was then agreed that Edwards was to have charge of the whiskey operation, McAfee of the gambling operation, and Hirrlinger of the prostitution activities. They agreed as to how protection money was to be divided. It was also agreed that Bill Edwards was to contact the whiskey dealers and inform them that if they paid the necessary protection money they would not be picked up by the police; but that if they would not cooperate they would be reported to the vice squad. To carry out this plan, Edwards was to give the police a description of the cars and license numbers of whiskey dealers who paid for protection (Tr. 458, 460-462, 530). At that time, the parties also agreed as to the composition of the vice squad. Petitioners Stephens, Peterson, Cole, Jackson and Harp were members of the vice squad (Gov. Ex. 3, Tr. 160, 162, 532). The raiding vice squad members were told that if they were to stay on

the squad they would have to protect certain whiskey dealers from raids (Tr. 583-585). Members of the vice squad who did not acquiesce were transferred (Tr. 585). One of the officers who refused to cooperate complained to petitioner Gott about his transfer but nothing was done about it (Tr. 585-586).

Early in June, 1956, another meeting was attended by petitioners Jones, Livingston, Gott and McAfee and co-conspirators Hirrlinger and Edwards. Livingston insisted that Edwards' brother, petitioner T. Martin Edwards, come into the deal. Bill Edwards was opposed to this arrangement and his wishes prevailed. Thereafter, Livingston several times insisted that Bill Edwards let his brother Martin participate but Bill Edwards continued to object (Tr. 463, 465-466).

During the period that Bill Edwards was in charge of the whiskey operation, he collected several hundred dollars either from whiskey dealers themselves or from those who picked up money from the whiskey dealers. Among those paying money were petitioners Griffing, Elmer Oakley, Lee Johnson, John Hood and Paul Rucker. Edwards turned over the money which he collected to petitioner Gott. He also exercised authority to determine which liquor dealers would be allowed to participate in the arrangements for protection and which ones would be left out (Tr. 471-478). He assured those who paid that they were to receive absolute protection from the city raiding squad (Tr. 479).

Early in July, 1956, Bill Edwards, Hirrlinger and Gott met at Edwards' home to distribute protection money which had been collected up to that point (Tr. 479-480). In the latter part of July, 1956, Livingston told Bill Edwards that he was returning Edwards' pay-

ment of $300 because there had been too much talking and he could not get the job done. Thereafter, petitioner Gott, acting upon orders, telephoned Bill Edwards and told him that the deal was completely off and that Bill Edwards was no longer in charge of the whiskey operation (Tr. 470-471). At that time, Bill's brother, petitioner T. Martin Edwards, was substituted for Bill in the conspiracy (Tr. 707) and payments continued (Tr. 725-727, 745-746, 752-754, 766). T. Martin Edwards was also a liquor wholesaler (Tr. 335-339, 687-688, 720-722).

In December, 1956, federal revenue officers raided several of the whiskey businesses in Tulsa, Oklahoma, without the knowledge or cooperation of the local police (Tr. 784-785). A grand jury investigation followed.

On the general theory of the case the judge charged as follows (Tr. 957-958):

> You are instructed that the police officers of the City of Tulsa, Oklahoma, are not under any duty by virtue of their positions to enforce the Federal Liquor Importation Act or the Internal Revenue laws of the United States. The mere failure of police officers of the City of Tulsa to make arrests or raids for the purpose of aiding in the enforcement of Federal laws pertaining to the transportation and sale of liquor would not be sufficient to prove a conspiracy upon the part of such officers to violate those laws. But, if such police officers enter into an agreement to aid and assist others in carrying on the liquor business and knowingly and intentionally cooperate with others in the importation of liquor into Oklahoma in violation of Federal law, or aid and assist others in carrying

on the business of either a wholesale or a retail liquor dealer, and wilfully failing to pay the special tax as required by Federal law, then such police officers do commit an offense against the United States.

The objects of a conspiracy may be numerous. Some may involve violation only of State law and some may even be innocent—but if one of such objects be to violate a criminal law of the United States, the case falls within the condemnation of the Federal conspiracy statute.

(2). On the Government's theory that the conspiracy from March 1956 to 1957 was part of a larger conspiracy going back to 1949, testimony was offered at the trial as to operations of the liquor business in Oklahoma prior to 1956. It was shown, for example, that a reporter for one of the local newspapers obtained money by promising not to publicize bootlegging activities (Tr. 164-197, 202, 212, 223, 232); and that members of the police department, including some of the present petitioners, had been collecting tribute from liquor dealers (Tr. 218-231, 372-387). There was also testimony that Don Gray, a Missouri liquor dealer whose conviction was reversed by the Court of Appeals in this case, had been selling liquor for importation into Oklahoma from 1951 to 1956 (Tr. 257-298; 302-311). Bill Edwards testified that he started trading with Gray in 1953 and did so continuously until November, 1956, and that he told Gray he was bringing the liquor into Oklahoma and reselling it to other liquor dealers (Tr. 317-319).

At the close of the Government's case, the judge explained to the jury at considerable length that he had

concluded that the evidence failed to make out a case of conspiracy prior to 1956 (Tr. 865-869). He told the jury to disregard testimony concerning collections from bootleggers prior to that date (Tr .865). He also directed judgment of acquittal as to reporter Bulloch, explaining why he thought the evidence as to Bulloch's activities were not related to the conspiracy charged in the indictment (Tr. 867-869). He further instructed the jury that evidence pertaining to transactions prior to March, 1956, was not material to the conspiracy and should not be considered, except that evidence as to unlawful importation of whiskey from May, 1951 to March, 1956 could be considered as bearing on the intent of the parties and as showing a course of conduct on the part of Gray and the other defendants to whom the evidence related (Tr. 866).

Again, in his final charge, the judge instructed the jury to disregard the evidence as to events prior to March, 1956 (Tr. 951), with the exception noted above (Tr. 957):

> The evidence presented by the Government—now I come to the exception with reference to this evidence, in the record, prior to March 1956: The evidence presented by the Government pertaining to the importation of liquor from Missouri into Oklahoma during the period from April 5, 1951, to on or about March 1956, the date upon which the defendants are charged with having entered into the unlawful conspiracy, and the evidence pertaining to the carrying on of a liquor business by some of the defendants during the same period, and wilfully failing to pay the special tax required by Federal law, may properly be considered by you but only for a limited purpose. It may be consid-

> ered only in connection with the question of an intent of the defendants in determining whether the defendants intentionally and wilfully conspired to commit offenses against the United States during the period from about March 1956 to on or about February 21st, 1957.

(3). During the trial, evidence was admitted as to gambling and prostitution activities which were carried on under protection of the Tulsa city police (Tr. 166-167, 437-438, 626-670). When objection was offered, the court said that the evidence would have to be connected up with the unlawful conspiracy to engage in the whiskey business, and that, if not so connected, he would instruct the jury to disregard it (Tr. 165, 166-167). Repeatedly during the proceedings, the judge stated that evidence as to gambling and vice was not to be considered unless connected up with the charge of conspiracy to violate the liquor laws (Tr. 438, 626; see also R. 156-157, 636, 662).

When, at the close of the government's case, the judge told the jury that he was limiting the charge to the period after March, 1956, he also said (Tr. 867):

> In that connection, I want to say to you, in order to emphasize it, that the evidence pertaining to the possible exploitation of prostitution here in the City of Tulsa should not be considered by the jury. It has no probative value—it has no bearing, is not material to any of the issues remaining in the case to be submitted to the jury, and should be completely disregarded in arriving at your verdict.

In explaining why he was directing a verdict of acquittal as to Bulloch, the judge mentioned that he con-

sidered some of the evidence more related to gambling than to the whiskey business (Tr. 867).

The judge did not again mention this subject in his final instructions but, when this was called to his attention, he pointed out that no request had been made; and that the only reason for the omission was that he felt he had placed great emphasis on the matter during the trial. He said that he would give a further instruction if requested, but no request was made (Tr. 965-967).

ARGUMENT

1. The argument that the evidence did not establish a conspiracy to violate federal law, but merely a conspiracy to sell and buy protection from state prosecution (Pet. 31-37) is best answered by the portion of the judge's charge quoted *supra,* pp 7-8. As there pointed out, the objects of a conspiracy may be numerous, and some may involve violation of state law, but if one of the objects is to violate a criminal law of the United States, the case falls within the condemnation of the federal conspiracy statute.

Here, in order to engage in the liquor business in Oklahoma, a dry state, bootleggers had to get their liquor from out of the state. The evidence was clear that many liquor dealers, Bill Edwards in particular, were getting their liquor from Missouri. Thus, protection of liquor dealers in their business necessarily included protection of that part of the business which involved procurement of supplies from without the state. As the evidence showed (particularly the evidence that the police were furnished with automobile and license descriptions), the conspirators carefully addressed themselves to the matter of avoiding inter-

ference with vehicles engaged in transportation of the contraband liquor.

It is settled, of course, that no formal agreement is essential to the formation of a conspiracy; a mutual implied understanding is sufficient. The agreement is generally a matter of inference deduced from acts, conduct and attendant circumstances. *Glasser* v. *United States,* 315 U.S. 60; *United States* v. *Manton,* 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664; *Telman* v. *United States,* 67 F. 2d 716, 717 (C.A. 10), certiorari denied, 292 U.S. 650.

2. Precisely for the reason that it was necessary to prove that the conspiracy embraced an agreement to import liquor into the state, the court properly permitted evidence of pre-1956 importations of liquor as bearing on the question of intent. To define the scope of the conspiracy, it was important to show that it was generally known and understood that engaging in the liquor business in Oklahoma meant importing liquor from out of the state, or buying from a wholesaler who had imported it. The trial court properly exercised its discretion in permitting this evidence bearing on the issue of intent. See *Glasser* v. *United States,* 315 U.S. 60, 81-82.

3. As to the evidence on gambling and prostitution, the judge was so careful throughout the trial in giving cautionary instructions (*supra,* pp. 10-11) that the claim of prejudice is without foundation. Our system assumes that the jury will follow instructions. *Delli Paoli* v. *United States,* 352 U. S. 232, 242; *Opper* v. *United States,* 348 U. S. 84, 95.

Actually the judge was probably more cautious than was required. The conspiracy with respect to liquor

was a part of a broader conspiracy embracing prostitution and gambling. It would therefore tend to prove the existence of the liquor conspiracy to show that a similar agreement covering these other activities was simultaneously operating.

4. Although no one stands convicted for the aspect of the conspiracy charged in count 2, *i. e.*, to commit felony violations, petitioners endeavor to find prejudice in the fact that they were charged in two counts, though only one conspiracy was involved. However, the judge carefully charged that the two counts involved only one conspiracy and explained that the separation was grounded in the fact that the present conspiracy statute provides a lesser punishment for conspiracy to commit a misdemeanor than for conspiracy to commit a felony (Tr. 969-971).

The claim that it was improper to avoid the problem which might have arisen had there been a single count charging a conspiracy to commit various offenses, *i. e.*, whether a general jury verdict would reflect the conclusion that there was a conspiracy to commit a misdemeanor or a conspiracy to commit a felony, has no substance. An analogy is provided by cases holding that an indictment may, in separate counts, charge different means of committing one offense even though only one punishment may be imposed. *Dealy* v. *United States,* 152 U. S. 539, 542; *Barnes* v. *United States,* 142 F. 2d 648 (C. A. 9). And see *Haupt* v. *United States,* 330 U. S. 631, 641, fn. 1. In no event do petitioners have any basis for suggesting possible prejudice. The only offense of which they stand convicted is the lesser offense of conspiracy to commit a misdemeanor.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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